**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| BETHANY COLLEGE, | ) | |
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| Respondent, | ) | Case 14-CA-201546 and |
| | ) | 14-CA-210584 |
| and | ) | |
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| THOMAS JORSCH, | ) | |
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| Charging Party, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| LISA GUINN | ) | |
| | ) | |
| Charging Party. | ) | |

## CHARGING PARTIES' ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Bethany College's principal exception to the decision of the Administrative Law Judge is her determination that the College did not establish a sufficient basis to assert an affirmative defense under *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979).[1] The sum and substance of the College's argument is that it is entitled to assert a defense under *Catholic Bishop* simply by virtue of the fact that "it is a higher education institution with a religious affiliation." (Resp.'s Exceptions Br. at p. 3.)

### A. The ALJ correctly asserted jurisdiction over the unfair labor practices.

The Eighth Circuit long ago explained why religious affiliation alone is insufficient to invoke the *Catholic Bishop* exception:

[1] The College also excepts to the ALJ's findings and conclusions that it engaged in unfair labor practices. (Respondent's Exceptions Brief at pp. 23-27.) As explained in Section B below, these exceptions fail to comply with the requirements of the Board's rules and regulations. Moreover, they re-hash Respondent's contentions about jurisdiction and make no real argument based on the merits.

Church operation, although important, constituted but one of many features which, considered together, presented potential first amendment problems in *Catholic Bishop*. Not only did the Catholic Church operate the schools, it actively propagated religious faith in the classrooms. The teachers in the bargaining unit, even though members of the laity, participated in that religious mission. The Supreme Court quoted extensively from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to illustrate that its concern stemmed from the religious nature of the schools' relationships with their teachers.

> "Religious authority necessarily pervades the school system.' * * *
> 'We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education.' * * *
> '[P]arochial schools involve substantial religious activity and purpose.'
> 'The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.' * * *
> '[T]he *raison d'etre* of parochial schools is the propagation of religious faith.'

*NLRB v. St. Louis Christian Home*, 663 F.2d 60, 64 (8th Cir. 1981) (quoting *Catholic*

*Bishop*, 440 U.S. at 501 & 503, quoting *Lemon*, 403 U.S. at 617, 616, & 628.)[2]

In *Tilton v. Richardson*, 403 U.S. 672, 680 (1971), a companion case to *Lemon*, the Supreme Court rejected "the proposition that religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." Chief Justice Burger – the author of the Court's opinions in both *Lemon* and *Catholic Bishop* – explained that there are "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Id.* at 685. In particular, Chief Justice Burger noted that, "by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines" and that "[m]any church-related colleges and universities are characterized by a high degree of academic freedom." *Id*. 686.

To demonstrate that the colleges at issue in *Tilton* "were characterized by an atmosphere of academic freedom rather than religious indoctrination," Chief Justice Burger relied on the fact that the colleges "subscribe to the 1940 Statement of Principles on Academic Freedom and Tenure endorsed by the American Association of University Professors and the Association of American Colleges." 403 U.S. at 681-82. In subsequent cases, the Court continued to rely on that fact that a "college subscribes to, and abides by, the 1940 Statement of Principles on Academic Freedom of the American

[2] *Accord Denver Post of the Volunteers of America v. NLRB*, 732 F.2d 769, 772 (10th Cir. 1984) ("[T]he First Amendment problems identified by the Court in *Catholic Bishop* stemmed not from the church's religious philosophy itself, but from the infusion of that philosophy into the school's functions and the critical role it performed."); *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818, 82 (2d Cir. 1980) ("The entire focus of *Catholic Bishop* was upon the obligation of lay faculty to imbue and indoctrinate the student body with the tenets of a religious faith.").

Association of University Professors" as indicating a separation between secular and religious educational functions. *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 756 (1976).

Like the colleges in *Tilton* and *Roemer*, Bethany College subscribes to the 1940 Statement of Principles on Academic Freedom. (GC Ex. 12, p. 55.) The 1940 Statement requires a college to spell out in advance the extent to which its "religious doctrine will become intertwined with secular instruction." *Catholic Bishop*, 440 U.S. at 501 (quotation marks and citation omitted).

While the 1940 Statement generally provides that "[t]eachers are entitled to freedom in the classroom," it allows "[l]imitations of academic freedom because of religious or other aims of the institution [that are] clearly stated in writing at the time of the appointment." American Association of University Professors*, 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, Academic Freedom ¶ 2 (1970).[3] As a result of the "limitations clause" in the 1940 Statement, "[i]nstitutions that limit[] freedom for religious or other purposes could be exempted from the general rules so long as they state[] in writing their restrictions as conditions for appointments." Marsden, "The Ambiguities of Academic Freedom," 62 Church History 221, 230 (1993).

The "limitations clause" was included in the 1940 Statement at the insistence of the Association of American Colleges (AAC), a co-sponsor of the Statement that

[3] Available at http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm.

included many religious colleges among its membership.[4] Metzger, "The 1940 Statement of Principles on Academic Freedom and Tenure," 53 Law & Contemp. Probs. 3, 22-24 & 32-36 (1990). The AAC "held that religious colleges could require faculty members to adhere to creeds but . . . insist[ed] that such requirements be made known to candidates for positions before they sign on." *Id*. at 24. The AAC maintained that, "provided it makes its doctrinal demands crystal clear in the original terms of employment, an academic institution may impose such demands" without "violating the rules of academic freedom." *Id*. at 33. In other words, religious colleges "may claim to have academic freedom when they limit it only in these sanctioned ways." *Ibid*.

"In practice, the limitations clause was taken to mean that religious colleges and universities were free to adopt their own principles of academic freedom without interference or censure by the academic community, so long as those principles were clearly announced in advance." McConnell, 53 Law & Contemp. Probs. at 307-08. This allowed "secular and religious universities [to] coexist, each operating within its own understanding of the principles needed for the advancement of knowledge." *Id*. at 308.

Professor McConnell described the options granted to religious colleges by the "limitations clause":

> Many religiously affiliated schools freely adopted the academic freedom norms of the secular universities. A very small number maintained the older dogmatic approach within the entire institution, requiring faculty and sometimes students to abide by religious codes of conduct and faith. A

[4] The Association of American Colleges is now known as the Association of American Colleges and Universities.

> larger number adopted various compromises with the secular position, embracing academic freedom in its essentials but taking certain steps to preserve the religious identity of the school. Many of these institutions confined religious constraints to those disciplines, such as theology, where religious norms were most directly relevant. The organized academic community did not attempt to interfere with these choices under the 1940 Statement, so long as they were clearly stated in writing.

*Ibid*.

In *Pacific Lutheran University*, 361 NLRB 1404, 1404 (2014), the Board "reexamine[d] the standard [it will] apply for determining, in accordance with the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), when [it] should decline to exercise jurisdiction over faculty members at self-identified religious colleges and universities." Henceforth, the Board will "decline to exercise jurisdiction over faculty members at a college or university that claims to be a religious institution" if "the college or university . . . holds out the petitioned-for faculty members as performing a religious function." *Ibid*.

By focusing on whether a college "holds its faculty out as performing a specifically religious role," *id*., at 1412, *Pacific Lutheran University* respects the First Amendment right of religiously affiliated colleges to define for themselves the extent to which "religious doctrine will become intertwined with secular instruction," *Catholic Bishop*, 440 U.S. at 501 (quotation marks and citation omitted). At colleges that hold themselves out as "maintain[ing] the older dogmatic approach within the entire institution" of "requiring faculty . . . to abide by religious codes of conduct and faith,"

McConnell, 53 Law & Contemp. Probs. at 308, the entire faculty is most likely exempt from the NLRA under *Catholic Bishop*. However, at the "larger number" of colleges that hold themselves out as "embracing academic freedom in its essentials" and "confine[] religious constraints to those disciplines, such as theology, where religious norms [a]re most directly relevant," *ibid*., the faculty members who are not subject to those constraints will not be exempt from the NLRA.[5]

To show that it held the charging parties out as performing a religious function in

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[5] By contrast with the *Pacific Lutheran University* test, the three-part test suggested in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), places an unconstitutional condition on a religiously affiliated college's ability to invoke the *Catholic Bishop* exception by requiring the college to publicly describe its general educational environment in a particular way. *See Speiser v. Randall*, 357 U.S. 513, 518-19 (1958).

The *Great Falls* test is meant to provide "some assurance that the institutions availing themselves of the *Catholic Bishop* exemption are *bona fide* religious institutions" by "requiring an institution to show that it holds itself out as providing a religious educational environment" in a way that might "dissuade" "some students and faculty" from associating with it. 278 F.3d at 1344. Because this "public religious identification... comes at a cost," it "serve[s] as a market check" that "helps to ensure that only *bona fide* institutions are exempted." *Ibid*.

A number of colleges that have a valid basis for claiming that some of their teachers are exempt under *Catholic Bishop* do not hold themselves out as generally providing a religious educational environment. Emory University provides an apt example. Emory is affiliated with the United Methodist Church, but the University most certainly does not hold itself out as generally providing a religious educational environment. Emory's Chandler School of Theology, however, ordains Methodist ministers, and the Chandler faculty would thus seem to be exempt under *Catholic Bishop*.

*Pacific Lutheran University* would allow a college, such as Emory, to invoke the *Catholic Bishop* exemption with respect to the portion of its faculty that it holds out as performing a religious function even though the college does not describe itself as generally providing a religious educational environment. This is so, because a college can satisfy the first prong of the *Pacific Lutheran* test by making only "a minimal showing" of religious affiliation. 361 NLRB at 1410. Rather, the focus of the *Pacific Lutheran* test is on how the college holds out various parts of its faculty.

teaching, the College relies on various statements in the Faculty Handbook about the *College*'s view of *its* mission. (Resp's Exception Brf. at pp. 12-13.)[6] However, when the Faculty Handbook comes to describing how the faculty is to perform its teaching function, the Handbook quotes from the 1940 Statement of Principles to the effect that "[t]eachers are entitled to freedom in the class room in discussing their subject" and "[l]imitations of academic freedom because of religious… aims of the institution should be clearly stated in writing at the time of appointment." (GC Ex. 12 at p. 55.) The uncontested findings of the ALJ in this regard were as follows:

> Here, no specific duties relating to religion were stated in the faculty appointment letters that are in evidence for both faculty eligible for tenure and part-time faculties (not eligible for tenure). Jorsch and Guinn provided undisputed testimony that they were never told they were expected to perform a religious role or maintain the university's religious environment. Likewise, there is no evidence that any faculty was tasked with meeting this requirement.

(ALJ Dec. at p. 10.)

In short, Bethany College describes the teaching performed by faculty members such as the charging parties as "characterized by an atmosphere of academic freedom rather than religious indoctrination." *Tilton*, 403 U.S. at 681. Thus, as described by the College itself, the teaching performed by the Charging Parties posed no "danger that religious doctrine w[ould] become intertwined with secular instruction." *Catholic Bishop*,

[6] The Faculty Handbook was admitted into evidence as G.C. Ex. 12. R 1, Exhibit F, which also contains the Handbook, was not admitted into evidence.

440 U.S. at 501 (citation and quotation marks omitted). The ALJ, therefore, correctly ruled that the College had not established that the charging parties were exempt from the protection of the NLRA under *Catholic Bishop*.

**B. The ALJ correctly found that the College engaged in unfair labor practices.**

The College makes a series of half-hearted exceptions to the ALJ's findings that it engaged in unfair labor practices; but, the College advances no real grounds (except conclusory statements without citation to legal precedent) for these exceptions other than its *Catholic Bishop* defense, and in particular no real legal argument except that it was somehow denied due process "to present evidence free of constitutional concerns." (Resp.'s Exceptions Brief at pp. 23-24.) The Board may disregard these exceptions for multiple reasons. First, the College's exceptions about the unfair labor practices fail to comply with the requirements of the Board's rules and regulations. They do not concisely state the grounds for the exceptions, and in particular do not offer any legal citation or argument. *See* 29 CFR § 102.46(a)(1)(i)(D) & 102.46(a)(2)(iii) (requiring a statement of the grounds for each exception).[7] Second, the College cannot have it both ways. The College cannot refuse to comply with subpoenas and refuse to permit witnesses to testify and then claim that the ALJ should have given it the opportunity to present its evidence. The College could have easily participated in the hearing while reserving its objections to the Board's jurisdiction. It acted at its peril in failing to do so.

Even considering the College's exceptions on the unfair labor practices, the ALJ

[7] The Board may also disregard Respondents' exceptions to the ALJ's finding that Jorsch does not meet the statutory definition of a supervisor or agent for the same reason. Other than a brief conclusory footnote, the College sets forth no grounds for that claim. (See Resp's Exceptions Brf. at n. 8.)

correctly found that the College had violated the Act. With respect to the confidentiality rule, the ALJ cited and applied the Board's recent *Boeing Co*. decision. The College's rule makes no attempt to define what the College means by its operations, activities, business affairs, and the files of faculty and employees. Reasonably interpreted, discussion about the College's "operations" and "activities" and the "files" of faculty and employees extends to information about the tenure process and the work performance of faculty and employees, and thus to terms of employment like wages, advancement, and discipline. The Board has held that such broadly worded rules violate the Act. *See, e.g., Battle's Transportation, Inc*., 362 NLRB No. 17 (2015) (directives not to discuss "human resources related" information and "company business" violate the Act). Further, per *Boeing Co.,* the record includes no evidence justifying such an onerous restriction on employee rights.

With respect to the College's threats against employees for disclosing "confidential" information, the College confirmed the meaning and the reach of its confidentiality rule when it threatened Jorsch with legal action if he disclosed aspects of his tenure plan. The College specifically stated that the contents of the plan were "confidential" and that Jorsch could not share its contents "with others." (G.C. Ex. 14.) The College also instructed employees, through Jones' response to the open letter, to not conduct a community-wide discussion of Jorsch's concerns about the tenure process. Jones said he was keeping the matter "confidential." (G.C. Ex. 17.) There is no real dispute that a tenure plan relates to terms of employment, including discipline and advancement. In threatening Jorsch with legal action, including the costs of a legal defense, and in telling employees not to conduct a community-wide discussion, the

College was interfering with the ability of Jorsch and employees to discuss the tenure process and to support one another. Again, the record includes no evidence justifying such a restriction on employee rights. *See Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015) (employer's blanket rule prohibiting employees from discussing matters under investigation violates Section 8(a)(1)).

The ALJ also correctly concluded that the College terminated Jorsch in violation of Section 8(a)(3) of the Act. The ALJ cited and applied *Wright Line.* The ALJ found that Jorsch was engaged in protected, concerted activity when, among other things, he wrote an open letter to faculty about the College's tenure process, not simply with respect to himself but also in concern for "fair treatment of current and future faculty." Jorsch also stated in the letter that he was sending his concerns to the Kansas AAUP. (G.C. Ex. 16.) While Jorsch uses the restrained language of an academic – "to open[] a dialog on campus" – the very nature of an open letter is to enlist the support of others, in this case, co-workers and the AAUP, and encourage them to join an effort to improve the workplace. There is also no dispute that the College knew of Jorsch's activity as Jones, the head of the College, wrote a response to the open letter. (G.C. Ex. 17.) Furthermore, the ALJ correctly found that the College terminated Jorsch because of his protected activity and found a nexus between his termination and animus towards his activity. Jones' response to the open letter refers to Jorsch's "veiled threats" regarding the AAUP. In addition, the College referenced the open letter and Jorsch's efforts to enlist faculty and others in his support – characterized by Jones as crossing a "professional line" and "insubordination" – in the termination letter. (G.C. Ex. 18.) If not enough, Jones had previously stated that any attempt by Jorsch to rally faculty in his

support would "meet with consequences." (ALJ Dec. at p. 15, l. 26.) The termination was that consequence, for Jorsch trying to open a dialogue (and rally his co-workers) for the fair treatment of the faculty as a whole.

Finally, the ALJ correctly concluded that the College terminated Guinn in violation of the Act. The timing of the decision, the College's unexplained reversal of its earlier plans to retain Guinn, and the College's knowledge of her marriage to Jorsch and its overwhelming animus toward Jorsch, all show that the College terminated Guinn to retaliate against Jorsch. *See World Fashion, Inc*., 320 NLRB 922, 931 (1996) (where the employees are husband and wife, discharging an employee in retaliation for his or her spouse's union activities is an unfair labor practice).

For the foregoing reasons, the Charging Parties request the Board to affirm the Judge's findings and conclusions, including that Respondent discharged the Charging Parties in violation of the Act.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed with the National Labor Relations Board on this 6th day of February 2019 using the NLRB's E-File system and served upon:

Roxanne Rothschild
Acting Executive Secretary
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The undersigned hereby certifies that a copy of the foregoing served on the following on this 6th day of February 2019 using the NLRB's E-File system and a copy served upon the following via e-mail:

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